

45
20/25

CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 920, 536 232 35.

THE UNITED STATES, APPELLANT,

v.

SIMON GOLDENBERG ET AL, COMPOSING THE CO-
PARTNERSHIP OF GOLDENBERG BROTHERS & COM-
PANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

FILED FEBRUARY 27, 1895.

(13002.)

20
15
100
20
200

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 920.

THE UNITED STATES, APPELLANT,

v.

SIMON GOLDENBERG ET AL., COMPOSING THE CO-
PARTNERSHIP OF GOLDENBERG BROTHERS & COM-
PANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate of judges	1	1
Statement of case	1	1
Questions certified	5	2
Clerk's certificate	7	3

13866

1 United States circuit court of appeals for the second circuit.

THE UNITED STATES OF AMERICA, APPELLANT, <i>against</i>	} (Suit "A," 647.)
SIMON GOLDENBERG, JULIUS L. GOLDENBERG, JOEL Goldenberg, Samuel L. Goldenberg, and Louis See- berger, composing the copartnership of Goldenberg Brothers & Company, in the matter of their impor- tations per "Servia," June 29, 1891, appellees.	

A judgment or decree of the circuit court of the United States for the southern district of New York having been made on the 30th day of July, 1894, and entered August 4, 1894, by which it was ordered, adjudged, and decreed that there was error in certain proceedings before the Board of United States General Appraisers in this that the protests herein were filed in due time and should have been entertained, and that the decisions of said Board herein be, and the same are hereby, in all things reversed, and that the merchandise involved in this suit or proceeding are dutiable, those composed of cotton at forty per centum ad valorem, under paragraph 355, and those composed of silk at fifty per centum ad valorem, under paragraph 414 of the tariff act of October 1, 1890; and an appeal having been taken from said judgment or

2 decree to this court by the above-named The United States of America, and the cause having come on for final hearing, a certain question of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the question arose are as follows:

1. Certain merchandise was imported and entered for consumption by the appellees from a foreign country into the port of New York June 29, 1891, which merchandise was classified for customs duties at sixty per cent ad valorem by the collector of the port of New York as to certain articles thereof as silk laces under Schedule L, paragraph 413, of the tariff act of October 1, 1890; and as to certain other articles likewise at sixty per cent ad valorem, as cotton laces under Schedule J, paragraph 373, of the same tariff act.

2. The entry of the said merchandise was liquidated at the custom-house in New York City on July 16, 1891.

3. On July 21, 1891, a protest was filed by the appellees, importers, in the custom-house at New York City, in which they claimed that certain of the merchandise, viz, the silk veilings and nettings, involved herein were dutiable under Schedule L of the tariff act of October 1, 1890, at fifty per cent ad valorem as manufactures of silk not specially provided for.

4. On the same date, to wit, July 21, 1891, a protest was filed by the appellees, importers, in the custom-house at New York City, in which they claimed as to certain other of the merchandise, viz, cotton nettings, involved herein, that this merchandise was dutiable under the

3 provisions of Schedule I of the tariff act of October 1, 1890, at forty per cent ad valorem as manufactures of cotton not specially provided for.

5. The estimated duties on all of this merchandise were paid by the importers upon the entry of the goods; and an amount of increased duties

was found due by the collector and was not paid by the importers, appellees, until July 27, 1891, more than ten days after the liquidation of the entry as above, and also subsequent to the filing of all the protests above set forth.

6. The said protests were for this reason not entertained by the collector of the port, and were rejected on the ground that the importers had not complied with the requirements of section 14 of the act of June 10, 1890. (26 Stat. at L., 131, 137).

7. The protests above referred to were thereafter submitted by the collector of the port to the Board of U. S. General Appraisers sitting at this port, together with the entry and invoices, and said Board, on November 28, 1891, rendered a decision affirming the decision of the collector in the rejection of said protests and in the classification of the merchandise for duty.

8. From this decision of the Board of U. S. General Appraisers the importers, appellees, appealed to the circuit court of the United States for the southern district of New York by petition praying for a review of said decision pursuant to section 15 of the said act of June 10, 1890;

4 and the said circuit court upon said petition ordered the Board of U. S. General Appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, pursuant to said section 15 of said act; and the said Board of General Appraisers thereafter made such return in response to the order of the court.

9. Evidence was taken in said circuit court before one of the said general appraisers as an officer of the court, showing that the merchandise involved was not known in trade and commerce as cotton lace or laces, nor as silk lace or laces, and such testimony was not contradicted by any evidence produced on behalf of the United States.

10. The case thereafter came on to be tried upon the record as above set forth before Honorable William K. Townsend, district judge, holding the said circuit court, who, deliberation being had, rendered an opinion filed June 29, 1894, reversing the decision of the Board of General Appraisers herein, and the judgment was thereupon made and entered as above set forth, from which decision and judgment the present appeal was taken by the United States to this court.

11. The contention as to the merchandise being, respectively, silk laces and cotton laces, as classified by the collector of the port, having been abandoned by the United States, it was conceded that if the protests above referred to should have been entertained by the collector the classification

5 of the merchandise involved should have been as claimed in said protests, respectively, under the tariff act of October 1, 1890.

Upon these facts this court desires instruction upon the question or questions of law for the proper decision of said cause, namely, as to the proper construction of section 14 of the act of Congress approved June 10, 1890 (26 Stat. at L., 131, 137), which is as follows:

"SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons

interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall within ten days after, "but not before," such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the Board of Three General Appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which Board shall examine and decide the case thus submitted; and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein; and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this act."

Was the payment of the full amount of the duties ascertained to be due upon the liquidation of the entry of the merchandise, required to be made by the importers, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, where the goods, as in the present case, were entered for consumption, in order to enable the protesting importers to have the exaction and classification reviewed by the Board of General Appraisers and by the courts? And to that end this court hereby certifies such question to the Supreme Court of the United States.

WM. J. WALLACE,
E. H. LACOMBE,
N. SHIPMAN,

*Judges of the United States Circuit Court of Appeals
for the Second Circuit.*

7 UNITED STATES OF AMERICA,
Second Circuit, ss :

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled The United States of America, appellant, against Simon Goldenberg, Julius L. Goldenberg, Joel Goldenberg, Samuel L. Goldenberg, and Louis Seeberger, composing the copartnership of Goldenberg Brothers & Company, in the matter of their importations per "Servia," June 29, 1891, appellants (Suit "A," 647), was duly filed and entered of record in my office by order of said court on the 23rd day of February, 1895, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second

circuit, at the city of New York, in the southern district of the State of New York, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

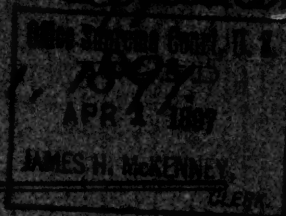
[SEAL.]

JAMES C. REED,

*Clerk United States Circuit Court of Appeals
for the Second Circuit.*

(Indorsement on cover :) Case No. 15804. Term No. 920. The United States, appellant, vs. Simon Goldenberg et al., composing the copartnership of Goldenberg Brothers & Company. U. S. circuit court of appeals, second circuit. Filed February 27, 1895. Supreme Court U. S. Received Feb. 26, 1895. Clerk's office.

Filed Apr 1 1897



In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT, }
v. } No. 232
SIMON GOLDBERG ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,)	No. 232.
<i>v.</i>	
SIMON GOLDENBERG ET AL.)	

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANT.

This case arose under the Customs Administrative Act of June 10, 1890. The only question relates to the timeliness of the payment of duties.

The merchandise whose dutiable classification was in issue in this proceeding was imported and entered for consumption at the port of New York on June 29, 1891. The entry was liquidated July 16, protests were filed July 21, and the duties were paid July 27, 1891.

The case turns upon § 14 of the Customs Administrative Act:

That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges,

and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, *shall* within ten days after, "but not before," such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption *shall* pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the Board of Three General Appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which Board shall examine and decide the case thus submitted; and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein; and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this act.

The question is stated by the court as follows (p. 3):

Was the payment of the full amount of the duties ascertained to be due upon the liquidation of the entry of the merchandise, required to be made by

the importers, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, where the goods, as in the present case, were entered for consumption, in order to enable the protesting importers to have the exaction and classification reviewed by the Board of General Appraisers and by the courts?

The question is discussed in certain decisions of the General Appraisers, but cursorily. It is considered in a careful and elaborate opinion of Attorney General Miller at 20 Op., 183. The Attorney General came to the conclusion that the duties must be paid within ten days after their liquidation, in case of entry for consumption, in order to entitle the importer to conduct proceedings for review under the act. Judge Townsend reached the opposite conclusion in the present case.

Importance of question.—Upon the present record the point appears very technical. The importer failed by but a single day to pay his dues within the time limited. Such accidents are rare and due to the importer's own carelessness or that of his agents. The question is an important one, however, because under the importers' construction of the statute they may and sometimes do indefinitely postpone a review of the collector's decision by simply refusing to pay the duties.

The practise was stated as follows by the Secretary of the Treasury to Attorney General Miller (20 Op., 185-6):

The practical result of this ruling is an accumulation in the custom houses of large numbers of protests, which may be made for speculative purposes, and which are not promptly transmitted to the Board of General Appraisers because of the failure

of the importers to pay the increased duties against the exaction of which they file their protest. The importers are thus enabled to take the initiatory step in suit for recovery of duties, full payment of which has not been made, and delay indefinitely the decision by the General Appraisers of the question raised by the protest, with a view of taking advantage of decisions which may hereafter be made in other cases, thereby defeating one of the chief purposes of the administrative act, which was to secure the prompt disposition of questions arising under the tariff laws and discourage the filing of mere speculative protests.

Attorney General Miller therefore states the question as follows (20 Op., 187) :

Whether the payment of duties thereby required must, like the protest, be made within ten days after liquidation, or, to state the question differently, whether Congress intended to favor the importer, by permitting him not only to have possession of his goods, but to keep the Government out of its revenue at pleasure, or, certainly, until judgment could be recovered against him in a plenary suit outside the statute of June 10, 1890; for it is precisely this advantage that is given the importer by the decision of the Board of General Appraisers of November 26, 1890, as the obstructive practice complained of shows.

Literal interpretation.—A literal interpretation of the statute favors the importers. This is due to the repetition of the word "shall" before the words "pay the full amount of the duties." If this second (italicized) "shall" were omitted, the literal interpretation of the statute would favor the Government contention.

Other interpretations.—The consequences of a literal interpretation of the statute are so remarkable that even Judge Townsend, in sustaining the importers' contention in the present case, does not adhere to it. He in effect inserts after the second "shall" the ambiguous words "within a reasonable time."

The Government contends that the second "shall" was inadvertently used and should be disregarded.

The general principles of construction applicable to this case are familiar. Revenue laws, like other laws, "should be so construed as to carry out the intention of the legislature in passing them." (*Ciquot's Champagne*, 3 Wall., 114, 145; *United States v. Stowell*, 133 U. S., 1, 12.) If, therefore, the wording of a clause is such as clearly to indicate that it requires correction in order to effectuate the intent of the legislature, the correction will be made either by striking out a word which has inadvertently crept in, or substituting one word for another. (*Union Ins. Co. v. United States*, 6 Wall., 759, 764; *Endlich on Interpretation of Statutes*, §§ 295 *et seq.* & *cas. cit.*) "If no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated." (*Id.*, § 301.) A recent instance of the rule that the intent governs the letter is to be found in *McKee v. United States*, 164 U. S., 287.

These cases are especially applicable when, as here, the sentence to be construed is long and involved, so that an error might easily creep in and remain unnoticed; and still more, when the sentence bears indubitable evidence

of carelessness of construction. The quotation marks about the words "but not before" in this sentence show that it was never revised by a skilful hand. Such errors of style as the repetition of this word "shall" at the wrong place are common, and are much less likely to catch or offend the eye than these sporadic quotation marks.

Strictly speaking, Judge Townsend is correct in saying that this statute contains no ambiguity. As, however, it contains the strongest evidence of unskilful construction, the court is at liberty to correct a plain mistake if it is impossible to reconcile the literal interpretation of the statute with its clear intent.

The statute makes a distinction between merchandise entered in bond and merchandise entered for consumption. The former words are equivalent to merchandise entered for warehouse. Since 1846 imported merchandise (regularly entered) has been classified into merchandise entered for consumption and merchandise entered for warehouse. The provisionally estimated duties upon the former class of merchandise must be paid before the importer can get possession of his property. Duties upon the latter class are payable at any time within three years at the importer's option. The history of this system is set forth in *Barney v. Rickard*, 157 U. S., 352, and the system still exists.

The reason for omitting the requirement of payment in the case of merchandise entered for warehouse is clear. If the requirement were extended to that class of merchandise, it would prevent any settlement of the legal

questions involved until the importer was ready to withdraw his goods from warehouse ; or it would require him to pay the duties while the goods were still in warehouse, and thus destroy the advantages of the warehouse system.

On the other hand, it is clear that the requirement is unnecessary as to the estimated duties which the importer must pay in order to get possession of goods which are entered for consumption.

The importance of the question is in relation to duties upon goods which have gone into the possession of the importer upon payment of the amount estimated by the collector at the time of the original entry, which estimate is thereafter found to have been too low. This class of importations contains a considerable proportion of those which are accompanied by fraud. The provisional estimate of duties is of course usually based upon the statements in the invoice. When the collector finds upon the final estimate or so-called "liquidation" of the duties that his estimate was too low, the goods have passed into the importer's hands, and the Government's sole remedy is by suit. Instances of such suits are to be found in *United States v. Schlesinger*, 120 U. S., 109, and *Patton v. United States*, 159 U. S., 500.

What is the effect of a literal interpretation upon such entries?

The finality of the collector's decision is destroyed by filing the protest. Until decision by the Board of General Appraisers, it remains open to review. No decision from the Board of Appraisers can be obtained until the importer pays the full amount of the duties and charges.

The importer thus has it in his power to postpone indefinitely or forever any decision of these questions under the Customs Administrative Act. Meanwhile the Government may sue him; but the questions of fact, being undecided by the proper tribunal, will have to be submitted to a jury. The dutiable valuation of the goods is, indeed, already settled under § 13 of the act (replacing § 2930 of the Revised Statutes), but many questions of fact may remain open, such as "the controlling use of the article in question; or its similitude to some other article; or the values of its component materials; or its weight and fitness; or whether labor is necessary to fit it for use by the consumer; or its commercial designation." (*Sonn v. Magone*, 159 U. S., 417, 422.)

These questions of fact, together with the questions of law involved, must be submitted to the Board of Appraisers if the importer so elect, by paying the duties and charges. Otherwise they go to the court and jury. Is there any reason why the importer should be given such a right of election? Is it consonant with the intent and purpose of the Customs Administrative Act, as shown either by its well known history or by its internal evidence? Was it not the main purpose of the act to provide a special tribunal for the trial of all such questions of fact and law, and withdraw all questions of tariff interpretation from juries?

That this cannot be the true construction of the statute is recognized by Judge Townsend, who, therefore, instead of striking out the second "shall," inserts thereafter the words "within a reasonable time." But does

this interfere any less with the letter of the statute than does the simple emendation which we suggest? Does it not rather import into it an altogether unworkable condition? Who is to decide whether the payment was made within a reasonable time? The collector, by transmitting or withholding the papers? Is he an officer who is likely to be charged by Congress with the decision of such a question as reasonableness of time? Yet his decision, if he shall see fit to withhold the papers, is final and conclusive. It cannot be controlled by a writ of *mandamus* outside of the District of Columbia. (*McIntire v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 6 Wheat., 598.) Nor even in the District of Columbia can the courts interfere, either by *mandamus* or by mandatory injunction, with the decision of an executive officer upon a question involving the exercise of discretion. (*Decatur v. Paulding*, 14 Pet., 497; *Gaines v. Thompson*, 7 Wall., 347; *Litchfield v. Register and Receiver*, 9 Wall., 575; *Redfield v. Windom*, 137 U. S., 636; *International Contracting Co. v. Lamont*, 155 U. S., 303; *Seymour v. South Carolina*, 2 D. C. App., 240, and *cas. cit.*)

Yet, if reasonableness of time is the test, it must be the collector who is to decide it. It can not be intended that his ruling should be reviewed upon a jury trial afterwards.

The learned District Judge, in attempting to escape from the manifest impossibility of a literal interpretation of this statute, fell into another untenable position. It is impossible to believe that Congress intended to give the importer a choice of forum while denying that privilege to the United States. It is almost as hard to believe

that Congress intended to make the right of review when the payment is not made within ten days dependent upon the permission of the collector, or even of his superior, the Secretary of the Treasury.

If, however, this court shall adopt Judge Townsend's theory, and thus in effect give the Secretary of the Treasury the right to impose a limit by general regulation upon the time within which the importer may obtain a review in such cases, the decision in the case at bar will avoid the evils feared by Secretary Foster and Attorney General Miller, as shown by their correspondence above quoted.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

○

Supreme Court of the United States.

OCTOBER TERM, 1897

No. 35.

UNITED STATES

VS.

SIMON GOLDENBERG ET ALS.

(Goldenberg Bros.)

BRIEF FOR APPELLEES.

Statement.

June 29, 1891, appellees imported into New York, and entered for consumption, certain merchandise, the character of which is of no consequence (though unnecessarily stated in the record) whether cheese or cottons, shoes or silks, since it is expressly found (page 2, folio 4, par. 11) that the classification and rate assigned to the goods by the collector, and his exaction of duty thereon accordingly, were wrong; and that the classification and rate claimed by Goldenberg Brothers in their seasonable and sufficient protests were the correct, legal and applicable ones.

The chronology is this;—Consumption entry, June 29, 1891, when the *estimated* duties were paid. (Rec. 1, fol. 2, pars. 1, 5.) The entry was liquidated, at the

rate so erroneously adopted, July 16, 1891. (*Id.* par. 2). July 21, 1891, the importers protested against the collector's wrongful exaction, indicating to him the correct classification and rate. (*Id.* pars. 3, 4, and p. 2, fol. 4, par. 11.) The increased duties under this liquidation were paid July 27, 1891, on the eleventh day after said liquidation. (*Id.*, pp. 1, bottom, and 2, top.) The sole question is, whether these appellees have lost their right to have this illegal exaction (paid under proper protests) returned to them because the payment was not made within ten days after liquidation. The Circuit Court thought not, the government appealed, and the Circuit Court of Appeals submits the matter to this Court.

POINTS.

After reciting the facts and (in full) the fourteenth section (26 Stats. 137) of the act of June 10, 1890, to be construed, the Circuit Court of Appeals propose the question to be answered, in this form :—

“ Was the payment of the full amount of the duties ascertained to be due upon the liquidation of the entry of the merchandise, required to be made by the importers (as well as the giving of notice of dissatisfaction, or protest) within ten days after the liquidation of such duties, where the goods (as in the present case) were entered for consumption, in order to enable the protesting importers to have the exaction and classification reviewed by the Board of General Appraisers and by the Courts ? ” (Rec. 3, fols. 5, 6.)

In other words, is complete payment within ten days after liquidation an element of jurisdiction, upon an appeal from the collector ?

I.

Statute does not impose suggested limitation.

From February 26, 1845—when the act passed “a few days” (4 Blatch. 488) after the majority decision in *Cary vs. Curtis* (3 How. 236) took effect—the right of an importer to recover excess of duties illegally exacted has rested upon statutes, by which it is created, limited and defined.

“The act was passed to change the law announced by that decision.” (2 Curt. C. C. 241.)

The importer’s right “is regulated, as to *all* its incidents, by EXPRESS statutory provisions.”

Arnson v. Murphy, 109 U. S., 238, 243.

Marine v. Lyon, 10 C. C. Ap. 318 bot.

Birtwell v. Saltonstall, 14 *Id.*, 1004, 1007.

The opinion, per PUTNAM, C. J., in this last-cited case observes there must be “a payment preceded by, accompanied with, or followed by a protest, *whichever is permitted by section 2931.*” (*Ibid.* 212.)

The inquiry now is, what is “permitted” by the fourteenth section of the act of June 10, 1890?

In the government’s briefs, here and below (where the cause was not argued, the Court declaring the intention to certify the question before the U. S. Attorney had completed his preliminary statement) it is conceded the statute does not *expressly* impose the ten-days’ limitation of payment as a condition of appeal from the collector’s decision. (Atty.-Gen.’s Brief, p. 4, bottom, and 6, near top.)

Upon the first-indicated page (4, bottom) it is said; —“A literal interpretation of the statute favors the importers.” Near the top of the sixth page, it is admitted that, “Strictly speaking, Judge TOWNSEND is correct in saying that *this statute contains no ambiguity.*”

"There is no room for inference ; and if the terms of the statute are not ambiguous, there can be no reasoning from analogy."

Marine v. Lyon, 10 C. C. A. 317, bottom.

The whole argument in this case is *ab inconvenienti* ; and rests upon a *false* assumption of any such inconvenience, and upon a *false* assumption of other facts supposed by the government to be such as affect the judicial construction of this section 14.

"There being no ambiguity, there is no room for construction. It would be out of place. The section must be held to mean what *the language* imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail."

Cherokee Tobacco, 11 Wall. 620.

Knickerbocker v. Peo. 102 Ills. 221.

II.

Supposed inconvenience imaginary.

The assumptions we declare unfounded do not originate in the government brief in this case, but are adopted (its p. 8) from an opinion signed by a former Attorney-General, July 6, 1891 ; apparently elicited by the Treasury customs-bureau because the General Appraisers, Nov. 26, 1890 (G. A. 33, Treas. Dec., p. 632) held a payment of duty within ten days after its liquidation *not* a necessary prerequisite to their entertaining jurisdiction of a protest in regard to an entry, as to which duties had been paid after these ten days ; and had said a prior ruling of theirs to the contrary to be *obiter*, inadvertent and wrong.

They say, *ubi sup.* ;—"The payment of duties, therefore, is not a condition precedent to the right to protest, but only to the right to have the papers in the case transmitted to the Board for their consideration.

The dictum to the contrary in our decision, G. A. 33, made Sept. 16, 1890, was unnecessary to the determination of that case, and was inadvertently used."

Had the Board deliberately considered and determined originally as they did Nov. 26, 1890, probably the question would never have been further mooted by the Treasury Department.

The assumptions by which it is sought to vary the natural meaning of an unambiguous statute are not sustained by any facts appearing upon this record, proven in this case, or of judicial cognizance.

The Board's and Court's (not simply "the importer's") construction of the statute does not, and cannot *per se*, "indefinitely postpone a review of the collector's decision," etc. (Govt. Br. 3.) By looking at the Attorney-General's opinion (20 A. G. Ops., at p. 185) it will be found that the means of enforcing prompt payment by retention of the examined packages is voluntarily relinquished, without any requirement of law that the lien should thus be lost; and that the personal security, which gives rise to this unnecessary talk about a jury trial (as if that were an evil to be avoided at all hazards) is also voluntarily taken, not given in the exercise of any absolute right conferred by Congress;—and this course is pursued because it has been found practically the best one, and that it involves no such evil as is suggested, and the supposed inconvenience arising from delay has no weight in comparison with the convenience of the established practice of giving up the possession of the goods. Towards the close of the Opinion (p. 194, top) the Attorney-General says the retention of the goods would prevent the delay of payment.

The fact that it is the general practice, under express statute, to so deliver *all* goods before liquidation settles their classification and rate of duty—hence, before it *can* be known whether there ever will be any protest, or occasion for one, or not—shows the utter insufficiency

of the Attorney-General's opinion to indicate any ground for giving a twist to the language of the statute. If a protestant does not pay the liquidated duty promptly, he is subject to precisely the same coercive measures as is the dilatory merchant who neglects to pay a duty which he does not challenge! And the unprotested duties are probably more than a hundred to one that is protested. (R. S., §§ 2869, 2899.)

Naturally, the estimate generally exceeds the duty assessed, the exceptions to this rule affording no ground for special legislation.

"This payment is but preliminary and indefinite, a sum in gross and by estimate, intended to be large enough to cover the actual legal amount of duty, when ascertained."

Moke v. Barney, 5 Blatch. 276.

The paragraph of the Atty.-Gen's Opinion, quoted at bottom of the third page of the Government's brief, begins;—"The practical result of this ruling is an accumulation in the custom-houses of large numbers of protests, which may be made for speculative purposes, and which are not promptly transmitted to the Board of Appraisers, because of the failure of the importers to pay the increased duties against the exaction of which they file their protests."

This is largely 'bugbear,' but so far as it contains any truth is not nearly the evil it is assumed to be; nor is that which is stated in the rest of this quotation. (Govt. Brief, 4 top.)

Suppose *all* protests were "promptly transmitted" so soon as filed:—postponing the consideration of the idea that *such* transmittal would defeat the avowed object of filing the protest with the collector—they would necessarily then "accumulate" in the offices of the Board of General Appraisers! Everybody knows that the greater number of protests are divisible into classes, so that the decision upon one case, of a given character, will sustain or nullify a great number of protests, whether these be upon the files of the Custom-

House or of the Board. It can make no difference upon the shelves of which of two buildings pertaining to the customs business of the government these protests rest while awaiting a determination. To transmit them from one building to the other has not the slightest tendency to hasten the Board's decision; and their retention at the custom-house does not in the least delay or defeat "the prompt disposition of questions arising under the tariff."

The Treasury Department recognizes this state of things. Its circular letter of July 15, 1891 (SS. 11,458) instructs collectors *not* to send the papers to the Board of Appraisers where the protest sets up an objection which had been sustained by a previous decision of the Board; but all such *entries* should be re-liquidated at the Custom-House, conformably to such decision, *without* recourse to the Board.

SS. 1602, May 1, 1895, addressed by the Secretary to the Board concludes thus;—

"I desire also to add that it will be well generally to *suspend action on protests* where the question involved has been decided by the courts adversely to the government, until you are definitely advised by the Department that no further proceedings will be taken therein."

This class character of the questions arising disposes of the slurring allusions in this Opinion to "speculative" protests.

If John Smith, importer, makes a hundred entries to which the same ground of protest is applicable, it is not "speculative" for him not to press them all at once, but to let the other ninety and nine await and abide the result of the first. If John Smith knows that Joseph Jones' protest presents the identical objection made in his, it is not "speculative" for him to let his await and be settled by the decision upon Jones' protest. Such awaiting to abide is familiar to the courts; and is commendable, rather than obnoxious to adverse criticism.

Touching the next paragraph quoted upon the fourth page of the government's brief, we have already noted that it is *not* the act of congress, but the voluntary action of the collector, that lets the importer have possession of his goods before final liquidation of his entry of them. R. S. sec. 2899 is permissive.

As can easily be inferred, the government practically suffers no loss of revenue from the course thus pursued ; otherwise, the Treasury Department would not sanction and continue it.

As to the vast majority of importations, of course, the duty exacted by the collector is paid without protest ; a protest is exceptional ; though, in the whole volume of the country's foreign commerce, they are numerous in their aggregate—absolutely numerous, but relatively to all entries not numerous. In a still greater majority of instances, the estimated duties, paid upon entry, more than suffice to pay the duties as liquidated. It is only in the still rarer instance of the payment upon entry being insufficient, and the protest being finally overruled, that there has been any delay in receipt of the government's revenue ; for if the protest is sustained, the unpaid excess was never rightly the property of the United States—the present case.

In the cause at bar, had the liquidated duty been paid on the same day protest against it was filed, the treasury would have become possessed then (instead of a day later) of money which the collector never should have exacted ; nor was it ever rightfully any part of the "revenue" of the United States.

Instances familiar to the Court will enforce this idea. At the date of the Attorney General's Opinion, there were filed, in the several custom-houses and before the Board, an "accumulation" of protests impugning the constitutionality of the act of October 1st, 1890, probably far greater in number than ever were used to embody any other objection. There was no dispute (in most cases) as to rate and classification if the act

of 1890 applied. No collector in this broad land ever assumed to liquidate under the act of 1883 after Oct. 1, 1890; or would dream of so acting upon the ground of unconstitutionality. Hence, the estimated duties were the actual duties, practically, in all these cases. The government could lose nothing, nor the merchant get any refund, unless this court held the act unconstitutional—which it did not. (143 U. S. 649.) This decision was announced Feb. 29, 1892. The Attorney General's opinion bears date Nov. 20, 1891. So it is an easy inference what kind of protests were then "accumulating"; and that their accumulation did not deprive the United States of revenue. The question as to the date when the act of 1894 took effect is another illustration. The collectors obeying the Secretary in adopting August 28 as the date, and there being (generally) no other dispute, the government, having collected the duties estimated upon this basis, lost no revenue on any protest not forwarded to the Board. (159 U. S. 78.)

As to this matter of accumulation to detriment of revenue, it is obvious that, after one protest against classification has been overruled by the collector, all subsequent importations of like character will have applied to them in the estimate of duties by the collector and naval officer (Treas. Reg. of 1892, Art. 298) the rate and classification so previously determined by the collector; and the protests will be designed to recover back what has been so estimated and paid according to such classification deemed by the importer to be erroneous, upon the grounds specified in his protests.

To justify a departure from the meaning of unambiguous language, the cited Opinion of the Attorney-General assigns, at one place, reasons which the facts stated in another portion of the Opinion show to be unfounded. To this extent, the Opinion is *felo de se*. Upon page 190 (20 Atty. G.'s Ops.) appears the time-

worn false assumption that the protesting importers have sold, or do sell, their goods "with duties, *as liquidated*, included in the price." For more than twenty years, we have seen this suggestion used to justify illegality, extortionate exactions, and the retention there of money that never ought to have gone into the United States treasury ; but we do not remember ever seeing it put forth before in a document containing the refutation of it. At page 185 of this same Opinion, he attributes the practice of taking personal security, in lieu of retaining the examined packages, to " the urgency of importers to get possession of their goods *without waiting for the liquidation of the duties* with which they are chargeable." (20 Atty. G.'s Op. 185).

The sale cannot include the duties " as liquidated," when made before such liquidation.

When we consider how large a portion [almost all] of the goods as to which any debate about classification, under a tariff-law admitted to be applicable, arises, consists of goods dependent for their profitable marketing upon a sale while the appropriate season, or prevailing fashion, lasts, we can easily understand why the importer cannot await the process of liquidation, usually taking weeks, and sometimes months, if not years—as we shall see presently.

Lest the government otherwise might possibly suffer, the collector assesses the highest rate, in every case of doubt, even if he is dubious of being ultimately sustained. To say that the importer, with his long experience, knowledge of business and its usages and nomenclature, at once conforms his actions to propositions he believes untenable, and protests against, is to disregard the promptings of human nature. When men will stake thousands upon a yacht race, or a horse-race, or a prize-fight, without ever having seen, or really knowing aught of, either contestant ; or bet heavy amounts upon an election months in the future ;—it is unreasonable to suppose that men are not governed

in their own affairs by their own mature judgment—*a fortiori* by their *opinions*—but prefer to hold on to their goods, to await the official promulgations of one of less experience. Moreover, a very, very large proportion of importations are sold, or contracted for, “to arrive.”

At all events, the assumption put forward to control construction finds no support in the record; and we say it has none in fact.

It is an attempt to support a construction holding that Congress intended to legislate in favor of the collection and retention of a tax it had never authorized, upon the ground that he from whom it was first extorted can relieve himself, and transfer the illegal burden to somebody who cannot help himself!

III.

The natural reading is the intended reading.

The Atty.-Gen's. Op., adopted as the governmental argument here, concedes that sections 14 and 15 of the Customs-Administrative Act “are a radical departure from existing law” (20 A. G. Ops. 189, bottom); yet the quotation marks referred to at the top of page 6 of the government's brief—and, as employed, in the seventh line of its second page—show that the language was framed with a careful application of the draftsman's knowledge of the decisions of this court upon the subject to which it relates.

The Board of General Appraisers (SS. 10,477-G. A. 127, Nov. 21, 1890) say, “The full significance of the words ‘but not before’ can be easily understood in the light of the decision of the U. S. Supreme Court, in

Davies v. Miller, 130 U. S. 284." It is evident they were inserted by a careful hand, to effect a change in the law, and by a hand 'skilful' to accomplish that purpose. The retention of the quotation-marks was a mere error, or inattention, of the compositor; and can hardly affect construction.

Applying judicial decisions to this section, it becomes evident the protest and the payment were severed from each other intentionally;—for a clear, just, obvious purpose.

At any time prior to payment, the collector can reconsider the liquidation, and so reliquidate as to conform to, or obviate, the objection raised by the protest. If he neglect, or refuse, to re-liquidate, the protesting importer can pay and thereupon the collector "shall transmit the invoice and all the papers," etc., to the Board. (Gov't. Br. p. 2, middle.)

Ten days were deemed sufficient time in which to formulate and file an importer's objections to the liquidation, or to determine if it was obnoxious to any; but it was not thought best to set any fixed time limitation to the collector's right to re-liquidate, it being morally certain no importer would pay so long as he hoped to change the collector's mind, but could bring the matter before the Board by making payment in case of refusal, or unreasonable delay.

Not questioning for a moment that revenue laws (or any other) are to be so construed as to carry out the manifest intention of the legislature, it must be conceded that *the sole legislative intent of section 14 was to give a remedy to an importer aggrieved by any decision of a collector; and this was given with full knowledge of the cases declaring that he would be entitled to the benefit of doubtful phraseology, and to interpret the language most beneficially for himself (84 Edinb. Rev., July, 1846, p. 118.)*

Girr v. Scudds, 11 Exchg. 191.

Hartranft v. Weigman, 121 U. S. 616.

The Attorney General's Opinion, behind which the government brief in this case ramparts itself, declares (20 Op. 189, bot.) section 14 to be "a *radical* departure from existing laws." It will clarify the question presented to turn back to earlier statutes, to observe the tenor of each, and see *from which* the act of June 10, 1890, here departs and *to which it closely adheres*.

The acts of February 26, 1845 (5 Stats. 727) substantially reproduced in the revision as section 3011, and that of June 30, 1864, § 14 (13 Stats. 214), being R. S., sec. 2931, were the law conferring and defining the rights of a protesting importer. These, we assure the Court, we do not purpose to discuss at length; but to note that, while both are expressly repealed by the act of June 10, 1890 (26 Stats. 142, top), the fourteenth section of this last-named act closely follows R. S., sec. 2931; but the whole act ignores R. S. sec. 3011, no equivalent for it being found therein!

Anybody who knew the late Justice BRADLEY would be little inclined to question the accuracy of any statement resulting from an examination by him. He was indubitably right when he declared (in *Barney v. Watson*, 92 U. S. 453, top) the act of 1845 superseded and repealed by the act of 1864. This statement was repeated in the opinion (per MATTHEWS, J.) in *Arnson v. Murphy*, 109 U. S. 241, near top, where sec. 3011 is treated as subsequently—"now"—in force, only because it "appears as section 3011 of the Revised Statutes." (109 U. S. 241.) The act of 1845 was revived by the misconception of the revisers, not called to the attention of Congress when the entire revision was adopted. This is all that is meant by *U. S. v. Schlessinger*, 120 U. S. 114.

Accordingly, for ten years—from June 30, 1864 to June 22, 1874—there was no statutory requirement of a *payment* of the duty, under duress of goods or otherwise, as a condition precedent to the review of the collector's assessment for duty.

The right to retain the goods was sufficient to compel payment of the duties, or giving satisfactory security therefor. During this decade, a denial of a right to be heard upon the protest prior to payment was not declared by law.

We will here interject the observation, as touching what is urged (more in the Atty. G's. Opin. and in appellant's brief below, than in that filed here) about the solicitude of Congress for prompt payment, that there has never been a time since the act of July 4, 1789 (1 Stats. 26, bottom, § 3) to the present hour (R. S., secs. 2869 and 2899) that a collector has not either been permitted to accept security, or required to give credit for duties (1 Stats., 168 top, § 41) whether protested against or not.

The report of the Committee of Ways and Means, accompanying the act of June 10, 1890, referring to sections 14 and 15 said (as quoted in the oft-mentioned Opinion (20 Atty. G.'s Ops., 187, near bottom;—"These sections are substituted for sections 2931 and 2932 of the Revised Statutes." Nothing is substituted for section §011, repealed.

In the late case of *Saltonstall v. Birtwell*, 164 U. S. 54, the two opinions read turned on the effect to be given to R. S. § 3011, as amended. There could not be two opinions on the point whether or not R. S. § 2931 by itself required payment to precede *administrative* consideration of the protest. In the act of June 10, 1890, § 14, as in R. S., 2931, the protest is directed against the decision upon—"liquidation" of—the *entry*; not to the exaction of duty according to that decision, which must be subsequent to it, and might be months after protesting. It is the collector's decision, on the entry of the merchandise, "as to the rate and amount of duties TO BE paid on such merchandise" that is made the subject of protest by THIS section. Under sec. 2931, suit could be brought within ninety days of the Secretary's decision of the appeal to him, for previously-

paid duties, and "within ninety days after payment of duties paid after the decision of the Secretary." No matter how long a time elapsed between liquidation and the determination of an appeal seasonably taken to the Secretary, payment was not a prerequisite to the hearing of that appeal by the Secretary; and, if made within three months after his decision, suit could be maintained for a judicial settlement of the question involved. There is nothing in this section (2931) which is avowedly followed in framing sec. 14, act of 1890, to justify the government's claim of any concurrent limitation of time for protesting and payment; or to make a limitation expressly confined to the filing of protest extend to the payment of the duty.

As already noted, such limitation would tend to defeat the whole object of protesting *to the collector* in respect of an entry, as that object has frequently been defined and declared by the courts. If the purpose were not the same under existing as under previous laws, a notice of appeal would have taken the place of a protest.

"The whole purpose of that notice is to give *the collector* opportunity to revise that decision."

Davies v. Miller, 130 U. S. 288.

Same v. Arthur, 96 *Id.* 149.

Heinze v. Same, 144 *Id.* 34,
and many cases there cited.

The collector still can (and not infrequently does) revise, and sometimes reverses his own decision, to conform to the protest, or to some judicial determination, made while the papers are still in his hands.

Art. 43 of the regulations made under this act of 1890 reads;—

"When an importer has thus notified the collector of his dissatisfaction, the collector (in conjunction with the naval officer, if there be one) *shall* review his action upon the entry and, if satisfied that the claim of the importer is a just one, he shall reliquidate the entry in accordance therewith, and shall send a statement of the facts to the General Appraisers."

This Art. 43 is quoted in SS. 12,068 dated Nov. 14, 1891, instructing a collector to be governed accordingly, and to reliquidate the duty, where convinced of error and of the correctness of the importer's protest, *without* sending the case to the Board of General Appraisers.

There is not the slightest intimation the duties had been paid.

As noticed before, ten days would be too brief a limitation for a voluntary reliquidation by the collector, conformable to the protest; and the statute is imperative that when the protest is followed by payment, the invoice and papers "shall" be transmitted to the Board.

Goldenberg Brothers' goods were imported June 29, and their entry liquidated July 16, 1891 (Rec. 1, fol. 2, pars. 1 and 2); but the usual course is, especially if the question is at all difficult, to take more time. In SS. 13,492-G. A. 1794, Oct. 26, 1892, it appears the duties were liquidated March 2, 1891, protest filed March 11, 1891, and the reliquidation *by the surveyor* at St. Louis, performing there the usual duties of a collector, was July 19, 1892 (over a year after the first liquidation) "exactly in accordance with the claims" of the protest of March 11, 1891; *held*, the importers could not file a second protest against this reliquidation, so made, setting up claims antagonistic to those of their first protest.

SS. 16,503, Oct. 24, 1895, reaffirms right of collectors to re-liquidate.

The natural reading, adopted by Judge TOWNSEND, being the only one which will give collectors the opportunity to consider the objections indicated by the protests to them, should not be departed from.

U. S. v. Wiltberger, 5 Wheat., 95, 96.

The cogent, controlling reasons which alone justify departure from the ordinary meaning of the language

of an act is indicated by this expression of the Supreme Court of Illinois :—

“ There are no such monstrous and absurd consequences involved as to require a departure from the natural and obvious meaning of the words here employed.”

Beardstown v. Va. 76 Ills. 42.

Sneed v. Com. 6 Dana, 339.

Fitzpatrick v. Gebhart, 7 Kans. 47.

IV.

No such public policy as assumed.

The act of June 10, 1890, indicates no purpose to hasten the payment of duties. A steady and sufficient income from this source is all the government needs ; that, taking one year with another, its revenues may be adequate to its outgoes. After the first year, the government would be just as well off, in providing for expenditures, if duties were payable, and sufficiently secured to be paid, in one year from the day of entry as upon the day of entry. All the prompt payment necessary is secured by requiring the *estimated* amounts to be “ first paid, or secured to be paid,” before a landing permit issues. This requirement of the act of March 2, 1799, C. 22, § 49 (1 Stats. 664) has sufficed for about a hundred years, being reproduced, from this act, as section 2869 of the revision ; amended by act of June 5, 1894 (28 Stats. 86 top). Under the act of 1790 (1 Stats. 168) the security might be to pay in four, six or twelve months, according to the character of the goods, or the country of their exportation ; and greater or less credit was extended by other such enactments. Now, an importer can place his entire importation in a public warehouse, draw it out in lots to suit,

any time within three years, paying on each withdrawal the duty then attaching to the goods withdrawn. Act of 1894, § 20.

When duties shall be paid is as much a subject of varying legislation—not of unvarying “policy”—as *what* (if any) duty shall be levied upon a given importation.

To extort money has never been the *sole* object of tariff legislation. “Congress wishes to foster an honest and honorable commerce by its laws, *no less* than to obtain revenue. It is neither the true policy nor right of the departments . . . to thwart the views of Congress . . . or to throw doubts and difficulties over the *liberal* course proper to be pursued generally toward the community in any branch of trade.” (*Marriott vs. Brune*, 9 How. 635.)

“What is termed ‘the policy of the government’ with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. *It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.*”

Hadden v. Collector, 5 Wall., 111-2.

St. Paul v. Phelps, 137 U. S. 533.

Vidal v. Girard, 2 Howd. 198.

“The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments.”

Soon Hing v. Crowley, 113 U. S. 710.

V.

Assumed policy entirely conjectural.

It appearing that, originally, the right was to protest (verbally if preferred) upon the payment of any sum as duties exacted, and prospectively as to future entries; which right, held to be taken away incidentally by the act of 1839, was restored in statutory form by the act of 1845, hastily passed to destroy the effect of the majority decision in *Cary vs. Curtis*; and changed again by the act of 1864; again accidentally by the revision, and deliberately by the act of June 10, 1890; the general customs-law from the earliest date to this time allowing a credit, upon security, for the payment of duties; and the instances in which the estimated duties, paid upon entry, would happen to be less than what *ought* to have been taken—(the present *not* being such a case, as the record shows)—would naturally be infrequent and trifling;—it follows that the assumed ‘public policy’ upon which the government’s argument is wholly based is purely conjectural; while the off-recognized purpose of a protest to the collector antagonizes the application of any such supposed ‘policy’ to the legislation under consideration.

“What the legislative intention was can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of *those words*. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*.”

Gardner v. Collins, 2 Pet. 93.

Minor v. Mechs. Bk. 1 *Id.* 64.

Smith v. State, 66 Md. 217.

As observed by the Lord Chancellor;—

“It is never very safe ground, in the construction of a statute, to give weight to views of its policy which are themselves open to doubt and controversy.” 9 Ap. Cas. 273.

R. v. Barham, 8 B. & C. 104.

The government brief consists, *in toto*, of an *assumption* of the existence of an undeclared intent to expediate the payment of *liquidated* (as compared with *estimated*) duties at an earlier day than that heretofore required ; and then arguing for a construction supposed to be required to effect this imaginary intent.

" Courts cannot *imagine* an intent, and bind the letter of the act to it."

Maxwell v. State, 40 Md. 293.

Hyatt v. Taylor, 42 N. Y. 261-2.

Frye v. R. R. 73 Ills. 403 top.

VI.

This brief will be closed with this suggestion ; that the construction assigned by Judge TOWNSEND is, at the very least, one of which the section is fairly capable. If Congress could perceive, as it must, that such construction was (legally speaking) *possible* then that was the *intended* construction ; for the principle that the citizen is entitled to the construction most favorable to him was equally well known to Congress.

VII.

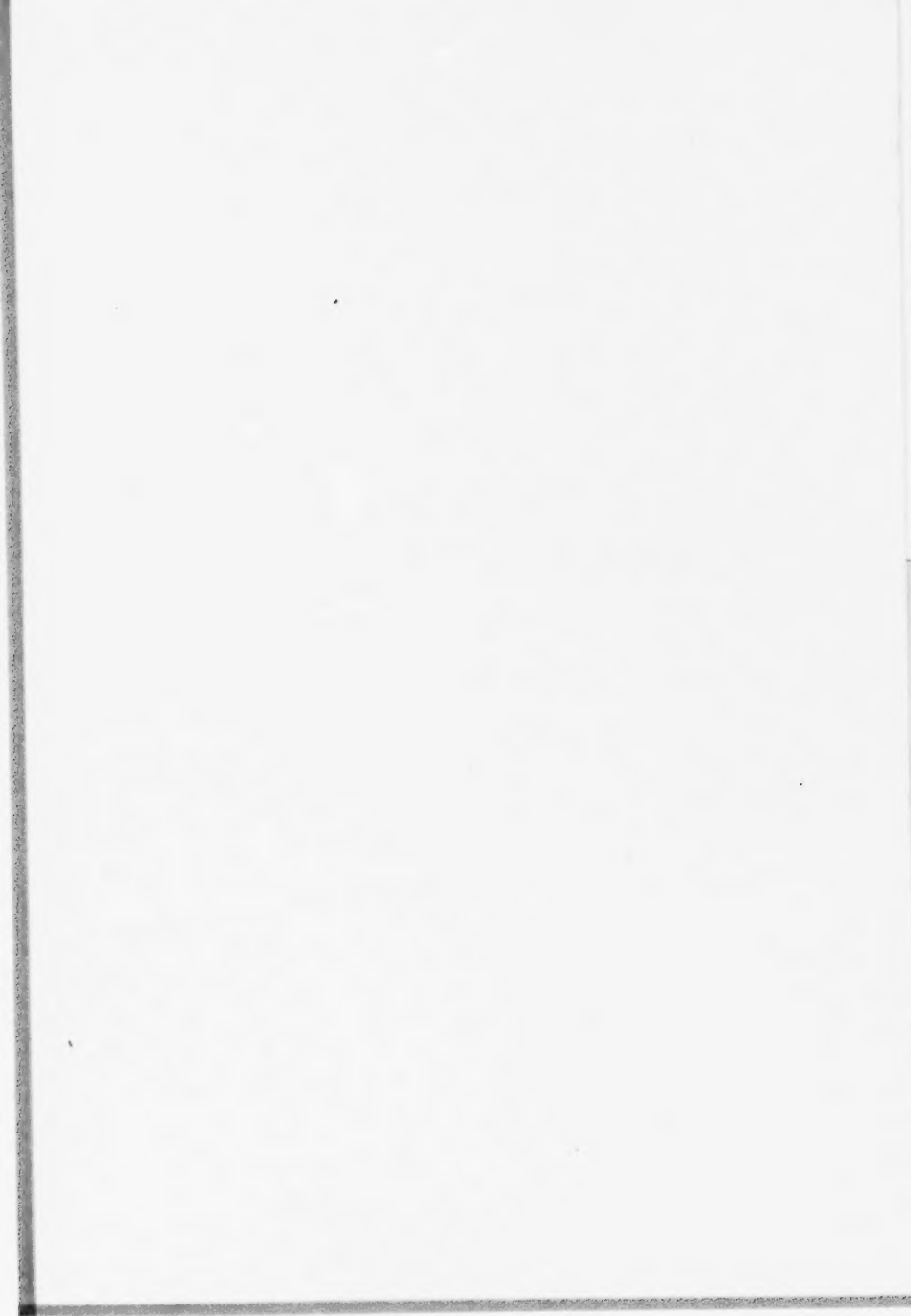
The judgment of the Circuit Court should have been affirmed by the Circuit Court of Appeals ; and the question it has certified should be answered negatively.

EDWIN B. SMITH,

120 Broadway,

New-York,

Of counsel for appellees



UNITED STATES *v.* GOLDENBERG.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 35. Argued and submitted October 14, 1897. — Decided October 25, 1897.

Where imported foreign goods are entered at a custom house for consumption, the payment by the importer of the full amount of duties ascertained to be due upon the liquidation of the entry of the merchandise, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, is not necessary in order to enable a protesting importer to have the exaction and classification reviewed by a board of general appraisers and by the courts, under the provision in section 14 of the act of June 10, 1890, c. 407, 26 Stat. 131. 137, "That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall within ten days after, 'but not before,' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or pay-

Statement of the Case.

ment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used ; and the cases are few and exceptional in which the letter of the statute is not deemed controlling, and only arise when there are cogent reasons for believing that the letter does not fully justify and accurately disclose the intent.

THE 14th section of the act of Congress, approved June 10, 1890, c. 407, 26 Stat. 131, 137, is as follows :

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character, (except duties on tonnage,) shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties shall, within ten days after 'but not before' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port, or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such who shall liquidate the entry accord-

Argument for the United States.

ingly, except in cases where an application shall be filed in the Circuit Court within the time and in the manner provided for in section fifteen of this act."

Upon this section, after stating the facts of this case showing its pertinency, the Circuit Court of Appeals of the Second Circuit has certified to us the following question :

"Was the payment of the full amount of the duties ascertained to be due upon the liquidation of the entry of the merchandise, required to be made by the importers, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, where the goods, as in the present case, were entered for consumption, in order to enable the protesting importers to have the exaction and classification reviewed by the board of general appraisers and by the courts?"

Mr. Attorney General, for the United States, submitted upon the brief filed April 1, 1897, by *Mr. Edward B. Whitney*, then *Assistant Attorney General*.

Upon the present record the point appears very technical. The importer failed by but a single day to pay his dues within the time limited. Such accidents are rare and due to the importer's own carelessness or that of his agents. The question is an important one, however, because under the importers' construction of the statute they may and sometimes do indefinitely postpone a review of the collector's decision by simply refusing to pay the duties.

The practice was stated as follows by the Secretary of the Treasury to Attorney General Miller. "The practical result of this ruling is an accumulation in the custom houses of large numbers of protests, which may be made for speculative purposes, and which are not promptly transmitted to the Board of General Appraisers because of the failure of the importers to pay the increased duties against the exaction of which they file their protest. The importers are thus enabled to take the initiatory step in suits for recovery of duties, full payment of which has not been made, and delay indefinitely

Argument for the United States.

the decision by the General Appraisers of the question raised by the protest, with a view of taking advantage of decisions which may hereafter be made in other cases, thereby defeating one of the chief purposes of the administrative act, which was to secure the prompt disposition of questions arising under the tariff laws and discourage the filing of mere speculative protests."

Attorney General Miller therefore states the question as follows: "Whether the payment of duties thereby required must, like the protest, be made within ten days after liquidation, or, to state the question differently, whether Congress intended to favor the importer, by permitting him not only to have possession of his goods, but to keep the Government out of its revenue at pleasure, or, certainly, until judgment could be recovered against him in a plenary suit outside the statute of June 10, 1890; for it is precisely this advantage that is given the importer by the decision of the Board of General Appraisers of November 26, 1890, as the obstructive practice complained of shows."

A literal interpretation of the statute favors the importers. This is due to the repetition of the word "shall" before the words "pay the full amount of the duties." If this second "shall" were omitted, the literal interpretation of the statute would favor the Government contention.

The consequences of a literal interpretation of the statute are so remarkable that even Judge Townsend, in sustaining the importers' contention in the present case, does not adhere to it. He in effect inserts after the second "shall" the ambiguous words "within a reasonable time."

The Government contends that the second "shall" was inadvertently used and should be disregarded.

The general principles of construction applicable to this case are familiar. Revenue laws, like other laws, "should be so construed as to carry out the intention of the legislature in passing them." *Cliquot's Champagne*, 3 Wall. 114, 145; *United States v. Stowell*, 133 U. S. 1, 12. If, therefore, the wording of a clause is such as clearly to indicate that it requires correction in order to effectuate the intent of the

Argument for the United States.

legislature, the correction will be made either by striking out a word which has inadvertently crept in, or substituting one word for another. *Union Ins. Co. v. United States*, 6 Wall. 759, 764. A recent instance of the rule that the intent governs the letter is to be found in *McKee v. United States*, 164 U. S. 287.

These cases are especially applicable when, as here, the sentence to be construed is long and involved, so that an error might easily creep in and remain unnoticed; and still more, when the sentence bears indubitable evidence of carelessness of construction. The quotation marks about the words "but not before" in this sentence show that it was never revised by a skilful hand. Such errors of style as the repetition of this word "shall" at the wrong place are common, and are much less likely to catch or offend the eye than these sporadic quotation marks.

Strictly speaking, Judge Townsend is correct in saying that this statute contains no ambiguity. As, however, it contains the strongest evidence of unskilful construction, the court is at liberty to correct a plain mistake if it is impossible to reconcile the literal interpretation of the statute with its clear intent.

The statute makes a distinction between merchandise entered in bond and merchandise entered for consumption. The former words are equivalent to merchandise entered for warehouse. Since 1846 imported merchandise (regularly entered) has been classified into merchandise entered for consumption and merchandise entered for warehouse. The provisionally estimated duties upon the former class of merchandise must be paid before the importer can get possession of his property. Duties upon the latter class are payable at any time within three years at the importer's option. The history of this system is set forth in *Barney v. Rickard*, 157 U. S. 352, and the system still exists.

The reason for omitting the requirement of payment in the case of merchandise entered for warehouse is clear. If the requirement were extended to that class of merchandise, it would prevent any settlement of the legal questions involved

Argument for the United States.

until the importer was ready to withdraw his goods from warehouse; or it would require him to pay the duties while the goods were still in warehouse, and thus destroy the advantages of the warehouse system.

On the other hand, it is clear that the requirement is unnecessary as to the estimated duties of which the importer must pay in order to get possession of goods which are entered for consumption.

The importance of the question is in its relation to duties upon goods which have gone into the possession of the importer upon payment of the amount estimated by the collector at the time of the original entry, which estimate is thereafter found to have been too low. This class of importations contains a considerable proportion of those which are accompanied by fraud. The provisional estimate of duties is of course usually based upon the statements in the invoice. When the collector finds upon the final estimate or so called "liquidation" of the duties that his estimate was too low, the goods have passed into the importer's hands, and the Government's sole remedy is by suit. Instances of such suits are to be found in *United States v. Schlesinger*, 120 U. S. 109, and *Patton v. United States*, 159 U. S. 500.

What is the effect of a literal interpretation upon such entries?

The finality of the collector's decision is destroyed by filing the protest. Until decision by the Board of General Appraisers, it remains open to review. No decision from the Board of Appraisers can be obtained until the importer pays the full amount of the duties and charges. The importer thus has it in his power to postpone indefinitely or forever any decision of these questions under the Customs Administrative Act. Meanwhile the Government may sue him; but the questions of fact, being undecided by the proper tribunal, will have to be submitted to a jury. The dutiable valuation of the goods is, indeed, already settled under § 13 of the act (replacing § 2930 of the Revised Statutes), but many questions of fact may remain open, such as "the controlling use of the article in question; or its similitude to some other article; or

Argument for the United States.

the values of its component materials; or its weight and fitness; or whether labor is necessary to fit it for use by the consumer; or its commercial designation." *Sonn v. Magone*, 159 U. S. 417, 422.

These questions of fact, together with the questions of law involved, must be submitted to the Board of Appraisers if the importer so elect, by paying the duties and charges. Otherwise they go to the court and jury. Is there any reason why the importer should be given such a right of election? Is it consonant with the intent and purpose of the Customs Administrative Act, as shown either by its well known history or by its internal evidence? Was it not the main purpose of the act to provide a special tribunal for the trial of all such questions of fact and law, and withdraw all questions of tariff interpretation from juries?

That this cannot be the true construction of the statute is recognized by Judge Townsend, who, therefore, instead of striking out the second "shall," inserts thereafter the words "within a reasonable time." But does this interfere any less with the letter of the statute than does the simple emendation which we suggest? Does it not rather import into it an altogether unworkable condition? Who is to decide whether the payment was made within a reasonable time? The collector, by transmitting or withholding the papers? Is he an officer who is likely to be charged by Congress with the decision of such a question as reasonableness of time? Yet his decision, if he shall see fit to withhold the papers, is final and conclusive. It cannot be controlled by a writ of mandamus outside of the District of Columbia. *McIntire v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 6 Wheat. 598. Nor even in the District of Columbia can the courts interfere, either by mandamus or by mandatory injunction, with the decision of an executive officer upon a question involving the exercise of discretion. *Decatur v. Paulding*, 14 Pet. 497; *Gaines v. Thompson*, 7 Wall. 347; *Litchfield v. Register and Receiver*, 9 Wall. 575; *Redfield v. Windom*, 137 U. S. 636; *International Contracting Co. v. Lamont*, 155 U. S. 303.

Yet, if reasonableness of time is the test, it must be the

Opinion of the Court.

collector who is to decide it. It cannot be intended that his ruling should be reviewed upon a jury trial afterwards.

The learned District Judge, in attempting to escape from the manifest impossibility of a literal interpretation of this statute, fell into another untenable position. It is impossible to believe that Congress intended to give the importer a choice of forum while denying that privilege to the United States. It is almost as hard to believe that Congress intended to make the right of review when the payment is not made within ten days dependent upon the permission of the collector, or even of his superior, the Secretary of the Treasury.

If, however, this court shall adopt Judge Townsend's theory, and thus in effect give the Secretary of the Treasury the right to impose a limit by general regulation upon the time within which the importer may obtain a review in such cases, the decision in the case at bar will avoid all evils.

Mr. Edwin B. Smith for appellees.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The question must be answered in the negative. Such answer is demanded by the obvious and natural import of the language, giving to it the ordinary grammatical construction. This is practically conceded by counsel for the Government, for he says in his brief "a literal interpretation of the statute favors the importers"; and again, referring to the opinion of District Judge Townsend, he adds, "strictly speaking, Judge Townsend is correct in saying that this statute contains no ambiguity." There are two separate clauses, each prescribing a condition. One is, "shall within ten days after 'but not before' . . . give notice," etc., and the other, "shall pay the full amount of the duties," etc. In the latter no time is mentioned, and, the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other.

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the lan-

Opinion of the Court.

guage that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense; *Holy Trinity Church v. United States*, 143 U. S. 457; it involves no injustice, oppression or absurdity, *United States v. Kirby*, 7 Wall. 482; *McKee v. United States*, 164 U. S. 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payment by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally with protest follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them. Certainly, there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition.

An answer in the negative must be certified to the Circuit Court of Appeals.